

No. 294692

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

Mountaineer Investments LLC,

Respondent

Gary and Barbara Heath

Appellants

BRIEF OF RESPONDENT

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INTRODUCTION

Respondent, Mountaineer Investments, LLC (*hereinafter* Mountaineer), without a breach of the peace, and after having gone out of its way to accommodate the Heaths' inability to make payments on a 17-year-old used motor home, securing a valid contractual obligation by the Heaths to Mountaineer, eventually rightfully repossessed the motor home. Upon repossession, Mountaineer did its best to dispose of the motor home, in a commercially reasonable manner, through a public bid sale process which resulted in obtaining a fair market price for the collateral and reducing the amount of deficiency owed by the Heaths. In doing so, Mountaineer acted pursuant to the terms of the contract between the parties and in compliance with all pertinent provisions of Washington's version of Article 9 of the Uniform Commercial Code, RCW 62A.9A-601 et seq.

Since the Heaths refused to make payments on the deficiency owed to Mountaineer, Mountaineer was forced to incur the additional expense of bringing legal action to recover the deficiency. In response, the Heaths counterclaimed against Mountaineer, seeking to penalize Mountaineer for its extra effort in making sure that the motor home was disposed in a commercially reasonable way, and seeking to recover a windfall. In doing so, the Heaths misconstrued and misinterpreted the letter, purpose, and intent of the relevant provisions of Article 9 of the Uniform Commercial

Code, as adopted in Washington State. Mountaineer moved for summary judgment at the trial court level and submitted that genuine issues of material fact did not exist as Mountaineer acted within the law at all times with respect to repossessing and disposing of the motor home securing the obligation in default. The trial court agreed with Mountaineer.

On September 17th, 2010, the trial court, in an oral ruling, granted summary judgment for Mountaineer, and against the Heaths on Mountaineer's claim for deficiency. The trial court granted Mountaineer's motion after carefully considering all pleadings, depositions, and affidavits deemed important and proffered by both Mountaineer and the Heaths at the time of the hearing, and the oral arguments of counsel. A subsequent written order, listing all the materials before and considered by the trial court was entered on October 1, 2010. The Heaths moved for reconsideration, attempting improperly to supplement the record and to argue issues not previously raised on summary judgment. The Heath's motion for reconsideration was also denied. The Heaths are again attempting to improperly supplement the record on appeal and to raise arguments they did not deem to be persuasive or relevant at the trial level.

Mountaineer submits that the trial court acted properly in granting summary judgment for Mountaineer and against the Heaths. The decisions of the trial court should be upheld in their entirety.

STATEMENT OF THE CASE

Mountaineer is a secured party and successor to the rights of KEY Bank under an Installment Sale Contract and Security Agreement (*hereinafter* “the contract” executed on May 10, 1994 by the Appellants Heath (*hereinafter* “the Heaths”), providing for the financing of the purchase price of a 1992 Fourwinds 23 Motor Home vehicle, (*hereinafter* “the collateral”). *See* Affidavit of Tom Olesky, CP 171-172 at ¶3, 4, 5 and Ex. "A" and "B" thereto at CP 177-182. Under the terms of the contract, the Heaths granted Mountaineer a purchase money security interest in the motor home, securing payment and performance of the Heaths’ obligations under the contract. *Id.* Said contract required the Heaths to pay 179 monthly installments in the amount of \$349.17 each due on the 9th day of each month, beginning on June 9, 1994. *Id.*

The Heaths made some payments under the contract. CP 171-172 at ¶6. However, after being late on several occasions, the Heaths failed to make payments, were in default in August and September of 2006, and started making reduced payments in October of 2006. *Id.* and Ex. C thereto at CP 183-192. Tom Olesky, an account officer for Mountaineer, contacted the Heaths, who informed him that they would like to sell the collateral and were unable to make the required payments. *Id.* Mountaineer, through Mr. Olesky,

eventually agreed to accept reduced payments of \$150 per month while the Heaths were trying to sell the collateral or re-finance it. *Id.*

Between December of 2006 and August of 2008, the Heaths made payments of \$150 per month, most of the time. CP 172 at ¶7. However, the Heaths then completely stopped making payments. *Id.* At that time, Mr. Olesky contacted the Heaths and they indicated that they were no longer able to make payments of \$150 per month. *Id.* Mountaineer was still willing to work with the Heaths at that time even though they were in default. *Id.*

In November of 2008, Mountaineer, through Mr. Olesky, agreed to allow the Heaths to sell the collateral for \$9,000 and work on a payment plan for the expected deficiency, so long as the Heaths still made at least \$150 per month while trying to sell the collateral. *Id.* at ¶8. The Heaths neither found a buyer for \$9,000 nor resumed making payments of \$150 per month. *Id.* The Heaths have admitted at their deposition that they stopped making payments on the collateral in August 2008 and that they were unsuccessful in finding purchasers for the collateral. CP 226 (at pp. 16-17), CP 227 (at pp.18-19). At the end of January of 2009, having made every effort to accommodate the Heaths in giving them time to sell the collateral and agreeing to accept reduced payments of \$150 per month, but not having received any payments since August of 2008, Mountaineer decided to repossess the collateral pursuant to the terms of the contract. CP 172 at ¶9.

Mountaineer, through Tom Olesky, contracted with Alpine Recovery, Inc. (*hereinafter* “Alpine”) and its agent, Mark Williams, for the repossession of the collateral for a fee of \$550. CP 172 at ¶10; Affidavit of Mark Williams, CP 132-133 at ¶3, 4, and Ex. A thereto at CP 136-142. Alpine was provided with a Repossession Affidavit, a blank Collateral Description Report, and contract and title documents with respect to said collateral. *Id.*, and Ex. B thereto at CP 142-154.

The collateral was repossessed on February 5th, 2009, by Alpine. CP 132 at ¶5, CP 173 at ¶11. The Heaths voluntarily gave the keys and surrendered the collateral to Alpine’s agents. *Id.* A condition report was prepared by Alpine at Mr. Olesky’s request, indicating that the collateral, a 17-year-old used motor home, was in mostly “fair” condition. *Id.* and Ex. C to the Affidavit of Mark Williams at CP 155-157.

Upon repossession, the collateral was taken to then Alpine’s place of business. CP 173 at ¶12, CP 133 at ¶7. Mountaineer initially contemplated selling the collateral at a private sale after February 25, 2009, to be facilitated by CoPart Airway Heights. *Id.* A notice of sale to that effect went out to the Heaths via certified mail on February 10, 2009. *Id.*, and Exhibit D to the Olesky Affidavit at CP 193-198.

On February 12, 2009, Mr. Olesky contacted Mr. Williams to check on the status of the collateral. CP 173 at ¶13. At that time, Mr. Williams

offered to assist Mountaineer in disposing of the collateral in a commercially reasonable way through a public bid sale process which he believed would yield a higher price for the collateral than what CoPart Airway Heights could obtain. *Id.*, CP 133 at ¶7. After a short discussion, Mr. Olesky and Mr. Williams agreed that having Alpine advertize the collateral for a public bid sale, to occur/begin on March 2, 2009, and seeking offers in the form of bids from interested members of the public would be the most commercially reasonable, efficient and cost effective method and most likely the best way of obtaining the highest offer for the sale of the collateral, thus in effect reducing the amount of any deficiency owed by the Heaths. CP 133 at ¶7; CP 173 at ¶13.

After talking to Mr. Williams, Mr. Olesky immediately contacted Mrs. Heath via telephone and informed her of this new arrangement. CP 174 at ¶14 and Ex. E thereto at CP 209; *see also* CP 227 (Deposition of Barbara Heath, pp. 20-21). A new written notice of the sale was sent by Mountaineer promptly on February 17, 2009. *Id.* A true and correct copy of said notice and proof of receipt by the Heaths is attached to the Affidavit of Tom Olesky as part of Ex. D, at CP 199-204; *see also* CP 228 (at p. 22 - the Heaths admitting receipt of said notice). Said notice was in the form required by RCW 62A.9A-611 and used the safe harbor form provided by Washington law for notices of sale in consumer transactions, RCW

62A.9A-614. *Id.* Said notice correctly identified the scheduled date and time on which the public bid sale was to occur/begin as March 2, 2009, at 9:00 a.m. and that the sale would be a public sale. *Id.* The notice also provided contact information for the Heaths, if they were interested in more details in addition to the details provided in the notice itself. *Id.*

Alpine promptly advertized the collateral for sale to the public in the local online and printed media, including Craig's List and Nickle Nic's, beginning on the week of February 22, 2009 and notice was given in said advertisements that Alpine would start accepting bids from the public at 9:00 am on March 2, 2009, the date listed on the notice of sale sent to Defendants. CP 133-134 at ¶8. Bids were accepted at Alpine's place of business and over the phone as advertised, beginning on March 2, 2009. *Id.* Mr. Williams also provided additional informal notice by word of mouth to several dealers and anyone who showed interest. *Id.* The collateral was displayed and available for viewing and inspection by the public during regular business hours at Alpine's premises, beginning the week of February 22, 2009. *Id.* The collateral was being sold "as is."

Alpine had made similar arrangements for advertising and sale of collateral on behalf of other secured creditors. CP 134 at ¶9. In Mr. Williams' experience, arranging for the sale of collateral through the above described public bid sale process generally yielded a higher price

than selling the collateral at a “dealers only” sale. *Id.* The above described public bid sale process was also, in Mr. Williams’ experience, another common way used by secured creditors in the Spokane area for selling repossessed collateral. *Id.*

On March 2, 2009, and after more than a full week of advertising, three bids were received from the public and people were still calling to inquire as to the collateral. CP 134 at ¶10. At that time, Alpine and Mountaineer decided to keep the March 2, 2009 bidding open to allow additional time for more bids to come in until March 9, 2009, so that the maximum value of the collateral could be realized. CP 134 at ¶10, CP 174 at ¶16. As a result of allowing said additional time, the number of offers increased and additional bids came in. *Id.* Alpine had approximately 20 inquiries over the phone regarding the collateral. *Id.* The highest bid as of March 2, 2009 and the highest bid overall when public bidding closed on March 9 was for \$5,100. *Id.* The second highest bid was for \$3,500. *Id.* True and correct copies of received written bids are attached as Ex. D to the Williams Affidavit at CP 158-168. Two of the bids specifically acknowledged seeing an advertisement of the collateral in the media, including Craig’s List. CP 162-163. One of the bidders also pointed out on the bid itself that the inside of the motor home was not “better than average.” CP 162.

Between March 9, 2009 and April 14, 2009, under Mountaineer's direction, Alpine attempted to contact the highest bidder and to conclude the sale for \$5,100. CP 134 at ¶11, CP 174 at ¶17. However, this highest bidder did not come through. *Id.* After obtaining authorization from Mr. Olesky, Alpine contacted the second highest bidder (at \$3,500) and asked them to increase their offer. *Id.* Alpine eventually negotiated a bid of \$4,000 with one of the bidders and that offer was taken after approval by Mr. Olesky. *Id.* The actual sale transaction was completed by Alpine on April 15, 2009. *Id.* After costs, the final proceeds check sent to Mountaineer was for \$3,775. *Id.*, and Ex. E (copy of proceeds' check) to the Williams Affidavit at CP 169-170.

Between February 5, 2010 and April 15, 2009, Mr. Olesky had only two contacts over the phone with the Heaths, both initiated by him: on February 12, 2009 (discussed above) and on March 26, 2009. CP 174-175 at ¶18, 19, and Ex. E thereto at CP 209-210. On March 26th, 2009, Mr. Olesky spoke with Barbara Heath, informed her that Mountaineer was working on concluding a sale with the highest bidder on the collateral, and requested that the Heaths make arrangements for paying the expected deficiency. *Id.* Ms. Heath indicated that the Heaths were financially unable to any make payments on any deficiency. *Id.* Mr. Olesky informed Ms. Heath that he would contact her again and let her know when the sale to

the highest bidder was completed. *Id.* At no time during both the March 12 and March 26, 2009 conversations, did the Heaths indicate that they had a family member or a relative interested in purchasing the collateral. CP 175 at ¶19. Alpine did not receive any bids or inquiries regarding the collateral from the Heaths or anyone indicating any relationship to Gary or Barbara Heath at any time. *Id.*; see also CP 134 at ¶12.

The Heaths admitted during their depositions that: 1) they did not provide a copy of the notice to anyone who may have been interested in purchasing the collateral; 2) they did not put any potential purchasers or bidders in contact with Tom Olesky at any time after the collateral was repossessed; 3) they stopped looking for any potential purchasers of or bidders on the collateral after the collateral was repossessed; 4) they did not at any time show up at Alpine's place of business to make a bid or inspect the collateral (including on March 2, 2009); 5) they could not afford to make any offer or bid on the collateral between February 2, 2009 and April 15, 2009. CP 228 (pp. 22-25), CP 234 (pp. 8-9).

The NADA estimate of value of the collateral which Mr. Olesky obtained as of February 3, 2009, listed low retail value at \$5,540. CP 175 at ¶21, and Ex. G thereto at CP 217-218. The \$4,000 price for the collateral was a fair market price at the time given the "fair" condition of the collateral, a 17-year-old used motor home, and the bids submitted. *Id.* Once the sale of

the collateral was completed, Mountaineer applied the net proceeds of the sale to the remaining balance due under the contract. CP 175 at ¶20. There still remained a deficiency due and owing to Mountaineer by the Heaths in the amount of \$13,973.95 as of May 6, 2009, with interest accruing at the per diem rate of \$3.47, until paid in full. *Id.*, and Ex. F thereto at CP 212-216. Per the terms of the contract, in the event of a lawsuit, Mountaineer was entitled to recover from the Heaths its court costs, private process server fees, investigation fees, and any other costs incurred in collection, as well as reasonable attorney fees.

STANDARD OF REVIEW

I. De novo of an order for summary judgment

The standard for review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn. 2d 291, 300, 45 P.3d 1068, 1073 (2002). Under RAP 9.12, on review of an order granting summary judgment, the appellate court will consider only evidence and issues called to the attention of the trial court on summary judgment. The court of appeals is limited to issues and materials considered by the trial court. *Alexander v. Gosner*, 42 Wn. App. 234, 237, 711 P.2d 347, 350 (Division 3, 1986). The function of a summary judgment proceeding is to determine whether genuine issues of material fact exist. CR 56. Mere unsupported

conclusory allegations and argumentative assertions by the nonmoving party will not defeat a summary judgment motion; to avoid summary judgment, the non-moving party must demonstrate through affidavit or affidavits facts sufficient to present a triable issue of fact. *Absher Construction Co. v. Kent School District #415*, 77 Wn. App. 137, 890 P.2d 1071 (1995); *Dombrosky v. Farmers Ins. Co. of Washington*, 84 Wn. App. 245, 928 P.2d 1127 (1996).

II. Abuse of discretion of an order denying reconsideration

Motions for reconsideration, in contrast with motions for summary judgment, are reviewed for an abuse of discretion. *Weems v. North Franklin School Dist*, 109 Wn. App. 767, 778, 37 P.3d 354, 359 (Division 3, 2002).

ISSUES PERTAINING TO HEATH'S ASSIGNMENTS OF ERROR

I. Procedural Issues

- A. The Heaths have inappropriately supplemented and referred to the record on appeal in violation of RAP 9.12.
- B. Under RAP 9.12, the Heaths are impermissibly raising for the first time on appeal the issue of whether the collateral was disposed of at a public sale.

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II. Substantive Issues

- A. The trial court properly concluded that genuine issues of material fact do not exist and Mountaineer is entitled to judgment as a matter of law that the notice given by Mountaineer of the March 2, 2009 public sale of the collateral through a public bid sale process was a proper notice under RCW 62A.9A-611, 612, 613, and 614.
- B. Even if the court finds that Mountaineer violated the notice requirements of Washington's UCC Article 9 provisions, the remedy sought by the Heaths is unavailable to the Heaths.
- C. Genuine issues of material fact do not exist and the trial court correctly granted judgment as a matter of law that Mountaineer disposed of the collateral in a commercially reasonable manner.
- D. Mountaineer is entitled to attorney's fees and cost on appeal in compliance with RAP 18.1(a),(b).

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ARGUMENT

I. Procedural Arguments

- A. The Heaths have inappropriately supplemented and referred to the record on appeal in violation of RAP 9.12 on the issues of whether the trial court erred in granting Mountaineer's cross-**

motion for summary judgment and denying the Heaths' motion for summary judgment.

RAP 9.12 provides that on review of an order granting summary judgment the appellate court will consider *only evidence and issues called to the attention of the trial court* on summary judgment. On review, the court of appeals is limited to issues and materials considered by the trial court. *Alexander v. Gosner*, 42 Wn. App. 234, 237, 711 P.2d 347, 350 (Division 3, 1986); *Riojas v. Grant County Public Utility District*, 117 Wn. App. 694, 696, 72 P.3d 1093, 1094 at FN1. The summary judgment hearing in this matter was held on September 17, 2010 and was fully documented in the Verbatim Report of Proceedings. CP 379-398. The trial court granted Mountaineer's motion after carefully considering all pleadings, depositions, and affidavits proffered by both Mountaineer and Heath at the time of the hearing, and the oral arguments of counsel. The court's oral opinion and ruling is contained in the Verbatim Report of Proceedings. CP 394-397. The Order granting Mountaineer's cross-motion for summary judgment was signed and entered on October 1, 2010, in a form agreed to by both parties. CP 373-375. The Order clearly delineated all evidence and issues presented to the trial court on summary judgment. The only affidavit/deposition evidence presented and argued by the Heaths on summary judgment was the Declaration of Facts of Gary and Barbara

Heath (CP 94-97) and the affidavit of counsel. It was not until the Heaths filed a motion for reconsideration, on October 11, 2010 (CP 399-400), that the Heaths inappropriately offered as additional evidence, without explanation and in violation of CR 59 (and over the objection of Mountaineer - *see* CP 477) the depositions of Mark Williams (CP 419-440, taken on August 25, 2010) and Tom Olesky (CP 445-458, taken on August 24, 2010), and vehicle licensing records (CP 441-444, copy received by the Heaths on September 3, 2010).

Pursuant to RAP 9.12, in deciding whether summary judgment is appropriate, this court should not consider any reference to the record beyond CP 398, and including but not limited to the depositions of Mark Williams, Tom Olesky, and vehicle licensing records. The Heaths did not deem these depositions and records to offer anything material or in addition to the properly and timely filed Affidavits of Mr. Olesky (CP 171-218) and Mr. Williams (CP 132-170) at the time of the summary judgment hearing. The Heaths cannot now assert that they have somehow now become relevant on appeal, or that this additional evidence was properly submitted on reconsideration under CR 59. The only factually relevant evidence before this court is the evidence as summarized by Mountaineer in its statement of the case above and as summarized in the summary judgment order. CP 373-375.

Without waiving its objection to this late supplementation and improper use of the record, Mountaineer would comment that these depositions, taken well in advance of the September 17, 2010 summary judgment hearing, substantially reaffirm what was said in the affidavits of Mr. Olesky and Mr. Williams and also do not create any genuine issues of material fact.

B. Under RAP 9.12, the Heaths are impermissibly raising for the first time on appeal the issue of whether the collateral was disposed of at a public sale.

Furthermore, the Heaths, did not dispute at any time prior to this appeal that the collateral was disposed at a “public sale.” In their initial summary judgment brief the Heaths concede that the collateral was sold at a “public sale.” CP 87. The Heaths again conceded and alleged a “public sale” in their reply memorandum on summary judgment. CP 250. Yet again, in their brief on reconsideration, the Heaths conceded and alleged that the collateral was sold at a public sale. CP 404. Thus, the Heaths have conceded this fact. They did so because the evidence on record overwhelmingly proved a public sale.

Now, for the first time on appeal, the Heaths attempt to characterize the sale of the collateral as a “private, secretive, bidding process” and not a public sale. *See* Respondent’s brief at p. 6, 14, 19, 26. This is in blatant

violation of RAP 9.12. The Heaths should not be allowed to raise the issue of whether the collateral was disposed at a public sale for the first time on appeal. Nevertheless, as discussed below, the assertion that the sale of the collateral was not a public sale is also completely unsupported by the record.

II. Substantive Issues

A. The trial court properly concluded that genuine issues of material fact do not exist and Mountaineer is entitled to judgment as a matter of law that the notice given by Mountaineer of the March 2, 2009 public sale of the collateral through a public bid sale process was a proper notice under RCW 62A.9A-611, 612, 613, and 614. Mountaineer accepted bids from the public beginning on the time and date indicated of the notice and eventually concluded a sale on April 15, 2009. Failure to give notice of the date on which a sale transaction resulting from the March 2, 2009 public sale was completed did not violate Washington law, particularly where: 1) The Heaths did not submit a bid or participate in the public sale at any time between March 2, 2009 and April 15, 2009, after given a fair opportunity to do so; and 2) allowing the March 2, 2009 bidding to continue post March 2, 2009 and negotiating a

higher price for the collateral with bidders resulted in Mountaineer obtaining a higher price for the collateral and benefited the Heaths by reducing the amount of the deficiency.

Washington State's adoption of portions of Article 9 of the Uniform Commercial Code pertaining to secured transactions, RCW 62A.9A-611 through -614 require that a secured party provide the debtors with a "reasonable authenticated notification of disposition." RCW 62A.9A-611(b) and Comment 2 thereto. RCW 62A.9A-614 requires that in consumer goods transactions certain minimum information is provided, including the time, place, and method of disposition. RCW 62A.9A-614(1); RCW 62A.9A-613(1). Although a safe harbor form that could be used in consumer transactions is also provided, RCW 62A.9A-614(2) emphasizes that a particular phrasing of the notification is not required. The purpose of the notice is to give the debtor an opportunity either to 1) discharge the debt and redeem the collateral, 2) to produce another purchaser or 3) to see that the sale is conducted in a commercially reasonable manner. *See* White and Summers, Uniform Commercial Code (6th Edition, 2010), Volume 4 at Chptr. 34-12(a), p. 485; *Buran Equip. Co. v. H. & C. Inv. Co.*, 142 Cal. App. 3d 338, at 341, 190 Cal. Rptr.878, 35 UCC 1694 (Cal. App., 1983). Cases involving notice issues should be resolved with these three purposes in mind. *Id.*

a) The Heaths were provided with proper notice of the disposition of the collateral.

It is undisputed, that the Heaths were provided with a notice of disposition of the collateral stating that a public sale will be held on March 2, 2009 at 9:00 am as required by RCW 62A.9A-611. Said notice, on its face, contained the information required by RCW 62A.9A-613, 614, and used the safe harbor form prescribed by RCW 62A.9A-614 for transactions involving consumer goods. *See* Ex. D to the Olesky Affidavit at CP 199-204; *see also* CP 228 (at p. 22). The notice specifically listed a date, a time, a place, and the manner of disposition – a public sale. *Id.*

The notice sent to the Heaths on February 17, 2009 did not say how long the public sale will take or when the bidding will close, and Washington law did not require that it say so. The law requires a “reasonable notification” of the time, place and method of disposition. RCW 62A.9A-611(b). While it was the initial intention of Mountaineer to close the public bidding on the same date it opened, having been notified by Alpine that people were still calling with inquires, Mountaineer decided to keep bidding open past March 2, 2009, in order to make sure that the highest possible price for the collateral was obtained. CP 134 at ¶10, CP 174 at ¶16. Once bidding closed on March 9, 2009, Alpine tried to contact the highest bidder to conclude the sale, but when the highest

bidder did not come through, the next highest bidder was contacted and asked to increase their bid. CP 134 at ¶11, Cp 174 at ¶17. Eventually Mountaineer negotiated a bid for \$4,000 (\$500 more than the second highest bid) and was finally able to conclude the public sale process which started on March 2, 2009 with a consummated sale on April 15, 2009. *Id.*

These facts unequivocally indicate that, while the Heaths were not notified of the actual date on which a “sale” was completed and possession of the collateral was transferred (April 15, 2009), prior to the completion of said transfer, the Heaths were properly notified of the date on which the public sale of the collateral would be held and bids would be accepted from the public (March 2, 2009). Not only that, but Mountaineer used the safe harbor notice form RCW 62A.9A-614 in giving said notice.

Mountaineer submits that the notice of sale sent on February 17, 2009 met all of the minimum requirements of the above cited statutes and was in fact a reasonable and accurate notification of the disposition of the collateral. A public sale did occur and commence as noted on March 2, 2009. The fact that public bidding was extended for an additional week, that submitted bids were further negotiated, and that a final sale was not completed until April 15, 2009 does not make such notice deficient.

Washington’s UCC statutes did not require that a sale be consummated on the March 2, 2009 date indicated on the notice. Mountaineer conducted

the March 2, 2009 sale in said manner in order to maximize the value of the collateral and to make sure that the sale process is commercially reasonable. As a result, Mountaineer managed to obtain a higher price than if it simply had cut off bidding on March 2, 2009, as the Heaths suggest in their brief. *See* Appellant's brief at p. 20. It makes no sense that the Washington's UCC notice of sale statutes are interpreted by this court, on the facts of this case, to penalize Mountaineer for its efforts in maximizing the value of the collateral.

Further, Washington's UCC statutes do not mandate that, once the highest bidder fell through, Mountaineer could not exercise reasonable efforts to get the sale consummated or accomplished with another bidder, as Mountaineer in fact undisputedly did in this matter. *See* RP at CP 395, 396.

The Heaths, in essence want the court to see the March 2, 2009 date on which the public sale began and the April 15, 2009 date on which a sale was completed in a vacuum and as two distinct "public sale dates." However, this is inconsistent with the facts of this case. A public sale was not held on April 15, 2009. Rather, a sale transaction was concluded on that date transferring ownership of the collateral to the highest bidder, as a result of a public bid sale process which began on March 2, 2009. The

notice given by Mountaineer is thus consistent with Mountaineer's conduct of the sale after the notice.

The purposes of the notice of sale statutes were satisfied in that the Heaths were given meaningful opportunity to discharge the debt and redeem the collateral (which they could not financially afford to do, did not do, and did not want to do), to produce a bidder for the March 2, 2009 public bid sale, or to see that the sale of the collateral was conducted in a commercially reasonable way. Having been given proper written notice of the March 2, 2009 sale date, the Heaths at no time between March 2, 2009 and April 15, 2009 submitted a bid on the collateral, produced a bidder, or contacted Mountaineer or Alpine in order to participate in the bidding process. CP 134, 175, 228, 234, The Heaths thus cannot argue and are *estopped* from arguing that they have been prejudiced in any way by bidding being extended past March 2, 2009.¹ *Commercial Credit Corp. v.*

¹ See generally *Commercial Credit Corp. v. Wollgast*, 11 Wn. App 117, 123, 124, 521 P.2d 1191, 1195, 1196 (Division 2, 1974)(holding that where debtor voluntarily relinquished possession of collateral because he had been unable to sell machines, debtor had notice of creditor's intention to sell but made no response and debtor was financially unable to take any action, debtor had either waived his right to notice of sale *or* was estopped to claim damage by reason of creditor's failure to give notice. The Heaths argue that *Wollgast* is inapplicable to this case as it was a commercial case, and there was no agreement in writing to waive the notice requirement after default. However, in *Wollgast*, the court also found that the debtor was *estopped* to claim damage by reason of creditor's failure to give notice. That estoppel precedent has not been superseded by any statute that may require a written waiver and is still good law. Finally, the court in *Wollgast* addressed the Article 9 UCC notice requirement in general and did not distinguish between commercial or consumer cases. *Id*; See also *Pioneer Dodge Center v. Glaubenslee*, 642 P.2d 28, 29(1982) (Debtor against whom a deficiency judgment was entered was not prejudiced by error in

Wollgast, 11 Wn. App 117, 123, 124, 521 P.2d 1191, 1195, 1196 (Division 2, 1974). It is undisputable that the Heaths, had they chosen to do so, could have shown up on March 2 at Alpine's place of business and submitted a bid or produced bidders to get involved in the sale process. CP 133, 134 at ¶8.

b) Genuine issue of material fact do not exist that the collateral was sold.

The Heaths, did not dispute at any time prior to this appeal that the collateral was disposed at a "public disposition." Neither did they dispute until their motion for reconsideration that a sale in fact occurred. The Heaths now decide to argue, contrary to the record, that a sale did not occur. The Heaths do so despite the testimony of Mark Williams and Tom Olesky and despite the proceeds check offered into evidence on summary judgment. CP 134 at ¶11; CP 174 at ¶17; Ex. E to the Williams Affidavit at CP 169, 170. The Heaths offer no explanation as to why Alpine would tender a proceeds check to Mountaineer if a sale did not occur.

The only fact that the Heaths offer in support of their proposition that a sale did not occur is that there is no record of vehicle title transfer in Washington's department of licensing. The Heaths cannot, for the first

designation of hour of sale of her repossessed truck, because while auction actually commenced at 10 a. m. on the day specified, she did not appear at 11 a. m., the time stated in the notification).

time on reconsideration, and now on appeal, introduce evidence regarding and blame Mountaineer for the purchaser's apparent decision not to pay the title transfer and registration fees so that state records reflect the vehicle title transfer and current registration. Today's owner of this now 19-year-old used motor home most likely has it permanently parked at a trailer park or a residence, a decision that, based on the DOL documents provided by the Heaths on reconsideration, the Heaths themselves also made by not registering the motor home since 2007. CP 442-443 (citing without waiving objection to supplementation).

Moreover, Mountaineer, as a secured party, cannot be held responsible for the actions of the current owner, who was given possession of the title/ownership documents at the time of sale by Alpine. Under RCW 46.12.101(3), it is the *transferee* (purchaser), who is responsible for applying for a new title/certificate of ownership within fifteen days after the sale. Under RCW 46.12.101(1)(a), an "owner" is only to report a sale. Under Washington's motor vehicle code, RCW 46.04.380, "owner" means a "registered owner" (the Heaths) where the reference may be construed as either to registered or legal owner. Therefore, there was no obligation imposed on either Mountaineer (secured party) or Alpine (selling agent) under RCW 46.12.101. Finally, whether a sale was reported does not bear

at all on the issue of whether the collateral was in fact sold, or whether the sale was commercially reasonable.

c) *Huntington Bank* is distinguishable

Further, the Heaths cite *Huntington Bank v. Freeman*, 53 Ohio App. 3d 127, 560 N.E.2d 251 (1989) in support of their proposition that Mountaineer's notice was improper. However, not only is an Ohio court opinion not binding on a Washington court, but the court in *Huntington* found that the creditor failed to prove that it sent any notice to the debtor of the date, place, and time set for the sale of the collateral. *Id.* At 130, 131, 560 N.E. 2d at 256. This is certainly not the case here, as proper notice was sent by Mountaineer and received by the Heaths. *Huntington* is thus distinguishable.

In summary, the trial Court properly concluded that genuine issues of material fact do not exist and Mountaineer is entitled to judgment as a matter of law that, on February 17, 2009, Mountaineer gave the Heaths proper notice of the disposition of the collateral at a public sale beginning on March 2, 2009, pursuant to RCW 62A.9A-611, 612, 613, and 614.

B. Even if the court finds that Mountaineer has violated the notice requirements of Washington's UCC Article 9 provisions, the remedy sought by the Heaths is inappropriate, unjust,

unprecedented under Washington law, will result in a windfall to the Heaths, and should not be imposed by the court.

Failure to give proper notice allows the debtor to recover any actual loss resulting from the failure of notice by setting the loss off against any deficiency. *McCord Credit Union v. Parrish*, 61 Wn. App 8, 14,809 P.2d 759, 762, 14 UCC Rep.Serv.2d 1283 (Division 2, 1991); RCW 62A.9A-625(b). A creditor who has violated Article 9 provisions regarding disposition of collateral faces a rebuttable presumption that the value of the collateral is at least equal to the amount of the outstanding debt. *Id.*; RCW 62A.9A-626.

Mountaineer did not violate any provision of Article 9 of the Uniform Commercial Code as proper notice was given of the disposition of the collateral. However, in the alternative, even if the court finds that proper notice was not given, it is Mountaineer's position that the proper remedy on the facts of this case would be imposing a presumption on Mountaineer that the debt equals the deficiency. Mountaineer alleges that that presumption has been sufficiently rebutted.

Not being able to show any actual damage or prejudice suffered, the Heaths alleged that an *additional* and proper remedy is instead contained in 62A.9A-625(c)(2), which states that, in consumer goods transactions, the debtor may recover "the credit service charge plus ten percent of the

principal amount of the obligation or the time-price differential plus ten percent of the cash price.” *Id.* However, RCW 62A.9A-625(d) makes this remedy unavailable, to the extent the debtor is also pursuing an elimination of the deficiency pursuant to RCW 62A.9A-626. The Heaths argued in their summary judgment memorandum that “as a matter of law this failure [to send the required notice] defeats Mountaineer’s claim for deficiency and entitles the Heaths to statutory damages.” CP 86, 87. The Heaths again argued in their response memorandum that “based on the failure to provide proper notice...the Heaths are therefore entitled to summary Judgment on Plaintiff’s [Mountaineer’s] claim for deficiency.” CP 257. The Heaths then tried to somehow explain in their response memorandum that, it is not that they are arguing that a deficiency does not exist, but it is “offset” by statutory damages. CP 258. This, however, was the first time this “offset” argument has made it into any of the Heaths’ pleadings. It was certainly not in their Answer, Counterclaim, or any prior summary judgment pleadings. *See* CP 23-27. It was simply an attempt to change the Heaths’ position on the brink of trial, to allow the Heaths, having already sought to eliminate the deficiency, to pile up statutory penalties instead. The Heaths attempted to do exactly what the statute prohibits them from doing – eliminate the deficiency and recover

duplicative statutory penalties. Therefore, the remedy in 62A.9A-625(c)(2) should be unavailable to them.

Not only that, but an application of 62A.9A-625(c)(2) would be clearly inappropriate on the facts of this case and in the way the Heaths intend to have this section applied. The purpose of 62A.9A-625(c)(2), as outlined in Comment 4. to said statute is to provide a “*minimum*” recovery in consumer goods transactions and not a windfall to debtors. Article 9 does not include a definition or explanation of “principal amount,” “credit service charge,” “time-price differential,” or “cash price,” but it leaves their construction and application to the court, taking into account the subsection’s purpose of providing a “minimum” recovery. *Id.* The Heaths have not offered evidence of the intent of the Washington legislature in enacting this statute.

In essence, the Heaths appear to be asking the court to forgive them any balance remaining under their contract with Mountaineer and to reward them with a an extraordinary \$32,403.30 cash award (plus attorneys fees, plus costs) sufficient to buy them a brand new motor home for their failure to pay for their old one. This is hardly the result contemplated by or intended by RCW 62A.9A-625 and is certainly not justice. Not surprisingly, there is no published Washington precedent that the Heaths

have been able to locate applying RCW 62A.9A-625(c)(2) to allow such a punitive recovery.

In fact, Washington courts have found that where debtors have been financially unable to take any action, voluntarily surrendered collateral, and had notice of the creditor's intention to sell, debtors have been estopped from claiming damages by reason of creditor's non-compliance with the notice statutes. *See Commercial Credit Corp. v. Wollgast*, 11 Wn. App 117, 123, 124, 521 P.2d 1191, 1195, 1196 (Division 2, 1974)(holding that where debtor voluntarily relinquished possession of collateral because he had been unable to sell machines, debtor had notice of creditor's intention to sell but made no response and debtor was financially unable to take any action, debtor was estopped to claim damage by reason of creditor's failure to give notice. Not only that, but, if the court were to award these punitive damages, the court will be punishing Mountaineer for its extra effort in obtaining the highest possible price for the collateral.

C. Genuine issues of material fact do not exist and the trial court correctly granted judgment as a matter of law that Mountaineer disposed of the collateral in a commercially reasonable manner and at a public sale beginning on March 2,

**2009, pursuant to the terms of the contract and the notice, and
in compliance with RCW 62A.9A-610.**

RCW 62A.9A-610 permits the creditor to dispose of the collateral in its present condition in a commercially reasonable manner, which could include a public or a private sale. Comment 7. to RCW 62A.9A-610 indicates that although not defined in the code, a “public disposition” (or sale) is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. *Id.* “Meaningful opportunity” is meant to imply that some form of advertisement or public notice must precede the sale and that the public must have access to the sale (disposition). *Id.*; White and Summers, Uniform Commercial Code (6th Edition, 2010), Volume 4 at Chptr. 34-11(e), pp. 473-474. Generally, a public sale is open to the general public or a major segment thereof and the public is apprised of the time and place of the sale. *Id.*; A public sale does not require a live/oral public auction. *Id.* All aspects of the sale must be commercially reasonable and creditors need to use their best efforts to sell the collateral for the highest price and to have a reasonable regard for the debtor’s interest. *Swanson v. May*, 40 Wn. App. 148, 154, 155, 697 P.2d 1013, 1017 (Division 3, 1985). Failure to give reasonable notification of a proposed disposition does not automatically bar the secured party from recovering a deficiency judgment. *Id.* at 156. To realize a satisfactory

price is the reason - *and the only reason* - why a secured creditor has to conduct a commercially reasonable sale. White and Summers, *supra* at p. 464.

It is undisputable (and undisputed until this appeal) that the March 2, 2009 public bid sale conducted by Mountaineer was a public sale. As outlined in the statement of the case above, and on the bids themselves, the collateral was advertised to the public on Craig's list and in a local publication by Alpine, in a manner in which Alpine advertises this type of collateral. The public had the opportunity to inspect the collateral and to submit bids over the telephone and at Alpine's place of business. CP 133, 134 at ¶8. In Mr. Williams' experience, the manner in which the sale was conducted was consistent with what other secured local creditors did when disposing of repossessed collateral. CP 134 at ¶9.

The Heaths attempt to argue that there is no evidence that the collateral was advertised to the public as alleged. This unfounded allegation is in complete contradiction of the affidavits of Mark Williams and Tom Olesky, and more blatantly of the fact that two of the bids offered into evidence, and authenticated by Mark Williams, on their face, specifically acknowledged the bidders seeing an advertisement of the collateral in the public media, including Craig's List. CP 162, 163; CP 133-134 at ¶8. There is no contradictory evidence whatsoever offered by the Heaths that

the collateral was not advertised to the public for sale as alleged in the Williams and Olesky affidavits. Thus, it is undisputable that the collateral was advertised for sale to the public through a public bid sale process. It is also undisputable that the advertising and notices to the public listed March 2, 2009 as the date on which bidding would open and bids will be accepted.

Mountaineer and Alpine gave their best efforts in obtaining the maximum price for the collateral. After bidding opened on March 2, and having realized that calls were still coming and more bids were submitted, Alpine and Mountaineer decided to allow additional time till March 9, prior to closing the bidding. CP 134 at ¶10; CP 174 at ¶16. They did so acting in the best interest of the Heaths, by making sure that the highest possible price for the collateral was obtained. Not only that, but once the bidding closed and the high bidder did not come through, Alpine contacted the next high bidder and continued to negotiate higher bids. CP 134 at ¶11; CP 174 at ¶17. Eventually, the final bid accepted was for \$4,000, which is \$500 more than the second highest bid, and \$500 less in deficiency that has to be paid by the Heaths, had the bidding simply closed on March 2, and had Mountaineer not negotiated further with bidders. *Id.* Additionally, the final price of \$4,000 was consistent with the N.A.D.A. low retail estimate of \$5,540, given the fair condition of the collateral and

the bids submitted. *See* White and Summers, Uniform Commercial Code (6th Edition, 2010), Volume 4 at Chptr. 34-11(c), p. 466 (*.., the courts should be slow to accept the debtor's assertions about how a better price could have been achieved. These assertions are often made by debtors who were scarce when the creditor was trying to sell the goods*). *See also* *Prince v. R&T Motors, Inc.*, 59 Ark. App. 16, 23, 953 S.W.2d 62, 66, 34 UCC 2d 261 (1997).

The Heaths also argue that since allegedly proper notice of the sale was not given to the debtors, the sale was per se unreasonable, regardless of the sale method employed and regardless of the fact that the Heaths could not afford to submit a bid, and did not contact Alpine or Mountaineer at any time between March 2, 2009 and April 15, 2009 to submit a bid or show any interest in participating in the public sale of the collateral at any time. The notice issue has already been addressed above, and Mountaineer has shown that proper notice was given, thus disposing of this argument. The court should not penalize Mountaineer for continuing to accept bids post March 2, 2009, in an effort to protect the Heaths' interest and maximize the value of the collateral. Allowing additional time for bidding resulted in more bids and a higher price; that is exactly what commercial reasonableness required in this case.

It would have been commercially unreasonable, once the highest bid fell through, for Alpine or Mountaineer to cancel the previous bids, re-note the sale for a different date and re-advertise the collateral, thus incurring more expenses to be added onto the Heath's deficiency, and risking the loss of the bids already in place. In essence, Mountaineer and Alpine employed a process similar to the public sealed bidding on public works projects in Washington – the bidders from the public are required to submit their first and best sealed offer (bid), not aware of what others are bidding, making sure that a fair price is reached. *See generally* RCW 36.32.245. Once the highest bidder backed out, Mountaineer and Alpine made an extra effort in negotiating the highest price possible with one of the remaining bidders. Mountaineer's bidding process was no less competitive than Washington's public works bidding process. *Id.*

The trial court properly concluded that genuine issues of material fact do not exist and Mountaineer was entitled to judgment as a matter of law that, having given proper notice of the disposition of the collateral, Mountaineer disposed of the collateral in a commercially reasonable manner. RP at CP 396-397. Alpine's advertising of the sale, including advertising on Craig's List, was commercially reasonable given the type of collateral (a 17-year-old used motor home), the manner of advertising, the popularity of Craig's List of which the trial court took judicial notice,

and the experience of Alpine in previously disposing of collateral on behalf of creditors. In fact, the Heath's themselves advertized on Craig's List in their earlier, unsuccessful attempts to sell the collateral. CP 227 at p. 18. Mountaineer acted in a commercially reasonable manner when it decided to allow for bidding on the collateral to continue past March 2, 2009, as people were still calling and showing interest as of March 2, 2009. Mountaineer also acted in a commercially reasonable manner when, after the highest bidder failed to consummate the sale, it instructed Alpine to negotiate a higher bid prior to consummating a sale with one of the remaining bidders.

That a relative of an agent for the repossession company submitted a bid (but did not end up eventually purchasing the collateral as a higher bid was negotiated with another bidder), did not take away from the reasonableness of the sale, where the actual purchaser did not have any familial or social relationship with Alpine. CP 439 at 77 (citing without waiving objection to supplementation). This matter was also not deemed relevant or important by the Heaths themselves in their arguments and pleadings on summary judgment and was thus waived by the Heaths.

Taking an extra few weeks, until April 15, 2009, to consummate a sale was commercially reasonable given that the highest bidder backed off, that Mountaineer was negotiating a higher price with the remaining bidders,

and that this resulted in a final sale price of \$4,000, or \$500 more than the second highest bid of \$3,500 (as of March 2, 2009). The price of \$4,000 was commercially reasonable given that: a) the collateral was 17-year-old used motor home; b) the N.A.D.A. estimate of value of the collateral which Mountaineer obtained as of February 3, 2009 listed comparable low retail value at \$5,540; and c) the amounts of actual bids submitted for the collateral. None of this was controverted by the Heaths on summary judgment, and it remained uncontroverted on their motion for reconsideration.

As discussed above, the Heaths also cannot, for the first time on reconsideration, and now on appeal, blame Mountaineer for the purchaser's apparent decision not to pay the title transfer and registration fees so that state records reflect the vehicle title transfer. Thus, the trial court correctly granted summary judgment for Mountaineer and against the Heaths that the sale conducted by Alpine was commercially reasonable.

D. Mountaineer is entitled to attorney's fees and cost on appeal in compliance with RAP 18.1(a),(b).

The original installment contract provides for and the Heaths have conceded that Mountaineer would be entitled to recover its attorney's fees on appeal as the prevailing party. CP 9 and Appellant's brief at p.39. The

court should award reasonable attorney's fees to Mountaineer, to be determined pursuant to the procedure outlined in RAP 18.1(d).

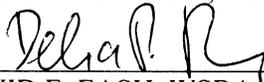
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CONCLUSION

The trial court correctly granted summary judgment for Mountaineer and against the Heaths. In doing so, the trial court did not penalize Mountaineer for its extra efforts in obtaining the highest possible price for the collateral and thus in effect reducing the amount of the Heaths' deficiency. The outcome should be no different on appeal. Unfortunately, it is apparently the Heaths' goal to continue litigating this matter and to advance arguments already deemed unpersuasive by the trial court, as well as new arguments not previously raised by them, thus in effect increasing the amount of contractual attorney's fees to be tacked onto their deficiency.

Mountaineer respectfully asks that this court affirm the trial courts' grant of summary judgment for Mountaineer and against the Heaths, as well as affirm the trial court's denial of the Heaths' motion for reconsideration. Additionally, Mountaineer respectfully requests an award of reasonable attorney's fees and costs on appeal.

EWING ANDERSON, P.S.

By:  (3/22/2011)
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APPENDIX

RCW 36.32.245. Competitive bids – Requirements – Advertisements - Exceptions

(1) No contract for the purchase of materials, equipment, or supplies may be entered into by the county legislative authority or by any elected or appointed officer of the county until after bids have been submitted to the county. Bid specifications shall be in writing and shall be filed with the clerk of the county legislative authority for public inspection. An advertisement shall be published in the official newspaper of the county stating the time and place where bids will be opened, the time after which bids will not be received, the materials, equipment, supplies, or services to be purchased, and that the specifications may be seen at the office of the clerk of the county legislative authority. The advertisement shall be published at least once at least thirteen days prior to the last date upon which bids will be received.

(2) The bids shall be in writing and filed with the clerk. The bids shall be opened and read in public at the time and place named in the advertisement. Contracts requiring competitive bidding under this section may be awarded only to the lowest responsible bidder. Immediately after the award is made, the bid quotations shall be recorded and open to public inspection and shall be available by telephone inquiry. Any or all bids may be rejected for good cause.

(3) For advertisement and formal sealed bidding to be dispensed with as to purchases between five thousand and twenty-five thousand dollars, the county legislative authority must use the uniform process to award contracts as provided in RCW 39.04.190. Advertisement and formal sealed bidding may be dispensed with as to purchases of less than five thousand dollars upon the order of the county legislative authority.....

RCW 46.04.380. Owner

“Owner” means a person who has a lawful right of possession of a vehicle by reason of obtaining it by purchase, exchange, gift, lease, inheritance or legal action whether or not the vehicle is subject to a security interest and means registered owner where the reference to owner may be construed as either to registered or legal owner.

RCW 46.12.101. Transfer of ownership—Requirements—Penalty, exceptions

A transfer of ownership in a motor vehicle is perfected by compliance with the requirements of this section.

(1)(a) If an owner transfers his or her interest in a vehicle, other than by the creation, deletion, or change of a security interest, the owner shall, at the time of the delivery of the vehicle, execute an assignment to the transferee and provide an odometer disclosure statement under RCW 46.12.124 on the certificate of ownership or as the department otherwise prescribes, and cause the certificate and assignment to be transmitted to the transferee. The owner shall notify the department or its agents or subagents, in writing, on the appropriate form, of the date of the sale or transfer, the name and address of the owner and of the transferee, the transferee's driver's license number if available, and such description of the vehicle, including the vehicle identification number, as may be required in the appropriate form provided or approved for that purpose by the department. The report of sale will be deemed properly filed if all information required in this section is provided on the form and includes a department-authorized notation that the document was received by the department, its agents, or subagents on or before the fifth day after the sale of the vehicle, excluding Saturdays, Sundays, and state and federal holidays. Agents and subagents shall immediately electronically transmit the seller's report of sale to the department. Reports of sale processed and recorded by the department's agents or subagents may be subject to fees as specified in RCW 46.01.140 (4)(a) or (5)(b). By January 1, 2003, the department shall create a system enabling the seller of a vehicle to transmit the report of sale electronically. The system created by the department must immediately indicate on the department's vehicle record that a seller's report of sale has been filed.

(3) Except as provided in RCW 46.70.122 the transferee shall within fifteen days after delivery to the transferee of the vehicle, execute the application for a new certificate of ownership in the same space provided therefor on the certificate or as the department prescribes, and cause the certificates and application to be transmitted to the department accompanied by a fee of five dollars in addition to any other fees required.

(6) If the purchaser or transferee fails or neglects to make application to transfer the certificate of ownership and license registration within fifteen

days after the date of delivery of the vehicle, he or she shall on making application for transfer be assessed a twenty-five dollar penalty on the sixteenth day and two dollars additional for each day thereafter, but not to exceed one hundred dollars. The director may by rule establish conditions under which the penalty will not be assessed when an application for transfer is delayed for reasons beyond the control of the purchaser. ...

Failure or neglect to make application to transfer the certificate of ownership and license registration within forty-five days after the date of delivery of the vehicle is a misdemeanor and a continuing offense for each day during which the purchaser or transferee does not make application to transfer the certificate of ownership and license registration. Despite the continuing nature of this offense, it shall be considered a single offense, regardless of the number of days that have elapsed following the forty-five day time period.

RCW 62A.9A-610. Disposition of collateral after default

(a) **Disposition after default.** After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) **Commercially reasonable disposition.** Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) **Purchase by secured party.** A secured party may purchase collateral:

(1) At a public disposition; or

(2) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

Comment 7 to RCW 62A.9A-610:

7. Public vs. Private Dispositions. This Part maintains two distinctions between “public” and other dispositions: (i) the secured party may buy at the former, but normally not at the latter

(Section 9-610(c)), and (ii) the debtor is entitled to notification of “the time and place of a public disposition” and notification of “the time after which” a private disposition or other intended disposition is to be made (Section 9-613(1)(E)). It does not retain the distinction under former Section 9-504(4), under which transferees in a noncomplying public disposition could lose protection more easily than transferees in other noncomplying dispositions. Instead, Section 9-617(b) adopts a unitary standard. Although the term is not defined, as used in this Article, a “public disposition” is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. “Meaningful opportunity” is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).

RCW 62A.9A-611. Notification before disposition of collateral

(a) **“Notification date.”** In this section, “notification date” means the earlier of the date on which:

- (1) A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or
- (2) The debtor and any secondary obligor waive the right to notification.

(b) **Notification of disposition required.** Except as otherwise provided in subsection (d) of this section, a secured party that disposes of collateral under RCW 62A.9A-610 shall send to the persons specified in subsection (c) of this section a reasonable authenticated notification of disposition.

(c) **Persons to be notified.** To comply with subsection (b) of this section, the secured party shall send an authenticated notification of disposition to:

- (1) The debtor;...

Comment 2 to RCW 62A.9A-611:

2. Reasonable Notification. This section requires a secured party who wishes to dispose of collateral under Section 9-610 to send “a reasonable authenticated notification of disposition” to specified interested persons, subject to certain exceptions. The notification

must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content. See Sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions).

RCW 62A.9A-613. Contents and form of notification before disposition of collateral: General

Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

- (A) Describes the debtor and the secured party;
- (B) Describes the collateral that is the subject of the intended disposition;
- (C) States the method of intended disposition;
- (D) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
- (E) States the time and place of a public disposition or the time after which any other disposition is to be made.....

RCW 62A.9A-614. Contents and form of notification before disposition of collateral: Consumer-goods transaction

In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

- (A) The information specified in RCW 62A.9A-613(1);
- (B) A description of any liability for a deficiency of the person to which the notification is sent;
- (C) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under RCW 62A.9A-623 is available; and

(D) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed, provides sufficient information:

[Name and address of secured party]

[Date]

NOTICE OF OUR PLAN TO SELL PROPERTY

[Name and address of any obligor who is also a debtor]

Subject: [Identification of Transaction]

We have your [describe collateral], because you broke promises in our agreement.

[For a public disposition:]

We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: _____
Time: _____
Place: _____

You may attend the sale and bring bidders if you want.

[For a private disposition:]

We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] [or write us at [secured party's

address]] and request a written explanation. [We will charge you \$for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at [telephone number] [or write us at [secured party's address]].

We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement:

[Names of all other debtors and obligors, if any]

(4) A notification in the form of [subsection] (3) of this section is sufficient, even if additional information appears at the end of the form.

(5) A notification in the form of [subsection] (3) of this section is sufficient, even if it includes errors in information not required by [subsection] (1) of this section, unless the error is misleading with respect to rights arising under this Article.

(6) If a notification under this section is not in the form of [subsection] (3) of this section, law other than this Article determines the effect of including information not required by [subsection] (1) of this section.

RCW 62A.9A-625. Remedies for secured party's failure to comply with Article.

(a) **Judicial orders concerning noncompliance.** If it is established that a secured party is not proceeding in accordance with this Article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) **Damages for noncompliance.** Subject to subsections (c), (d), and (f) of this section, a person is liable for damages in the amount of any loss caused by a failure to comply with this Article or by filing a false statement under RCW 62A.9A-607(b) or 62A.9A-619. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

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(c) Persons entitled to recover damages; statutory damages in consumer-goods transaction. Except as otherwise provided in RCW 62A.9A-628:

(1) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) of this section for its loss; and

(2) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

(d) Recovery when deficiency eliminated or reduced. A debtor whose deficiency is eliminated under RCW 62A.9A-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor may not recover under subsection (b) or (c)(2) of this section for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance to the extent that its deficiency is eliminated or reduced under RCW 62A.9A-626.

4. Minimum Damages in Consumer-Goods Transactions. Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former Section 9-507(1) and is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted. Subsection (c)(2) leaves the treatment of statutory damages as it was under former Article 9. A secured party is not liable for statutory damages under this subsection more than once with respect to any one secured obligation (see Section 9-628(e)), nor is a secured party liable under this subsection for failure to comply with Section 9-616 (see Section 9-628(d)).

Following former Section 9-507(1), this Article does not include a definition or explanation of the terms “credit service charge,” “principal amount,” “time-price differential,” or “cash price,” as used in subsection (c)(2). It leaves their construction and application to the court, taking into account the subsection's purpose of providing a minimum recovery in consumer-goods transactions.

RCW 62A.9A-626. Action in which deficiency or surplus is in issue.

(a) **Applicable rules if amount of deficiency or surplus in issue.** In an action arising from a transaction in which the amount of a deficiency or surplus is in issue, the following rules apply:

(1) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part.

(3) Except as otherwise provided in RCW 62A.9A-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorneys' fees exceeds the greater of:

(A) The proceeds of the collection, enforcement, disposition, or acceptance; or

(B) The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(4) For purposes of (3)(B) of this subsection, the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorneys' fees unless the secured party proves that the amount is less than that sum.

**WASHINGTON RULE OF APPELLATE PROCEDURE 9.12
SPECIAL RULE FOR ORDER ON SUMMARY JUDGMENT**

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called

to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

J.J. White and R.S. Summers, Uniform Commercial Code (6th Edition, 2010) – cited pages attached as APPENDIX ATTACHMENT A.

APPENDIX ATTACHMENT A

**J.J. White and R.S.
Summers, Uniform
Commercial Code (6th
Edition, 2010) – copies
of cited pages.**

method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

To realize a satisfactory price is the reason—and the only reason—why we force the secured creditor to do a commercially reasonable resale. Yet, the price is not an “aspect” of the sale and a low price does not show that any “aspect” was commercially unreasonable. Reasoning backward from a low price to a conclusion of commercial unreasonableness is not fair to the secured creditor.⁹ On the other hand, we suspect that low price (lower than what the court thinks right) is in fact the single most important fact in most of these cases—even in cases where it is not identified as the basis for the court’s finding of noncompliance with former 9-504.¹⁰ So price is the *eminence grise*. Even though the court may not mention price, a high price will save the creditor and a low price is likely to put the creditor in trouble.

What are these important “aspects” of the disposition? The cases focus mainly on six things, but there are many more. First, did the sale occur “too quickly” after the notice, or “too long” after the repossession? If the goods depreciate and the creditor waits any appreciable time, the sale will be attacked for not being timely. For that reason, a creditor who repossesses an automobile in the winter dares not await the spring season for a better market. A creditor who sells the inventory of a business where similar sales would normally occur only with two or three weeks of advertising and notice, will be in trouble if the creditor advertises for a public sale to be held five days later. If timing is important, the creditor can be outside the bounds of commercial reasonableness either by selling too quickly or too slowly.¹¹

9. When a creditor submits evidence as to the commercial reasonableness of a sale (e.g., notice to the debtors, advertising the sale in the county paper), a debtor must demonstrate that the process was flawed, beyond an assertion that a better price could have been obtained elsewhere, in order to establish commercial unreasonableness. *Prince v. R & T Motors, Inc.*, 59 Ark.App. 16, 953 S.W.2d 62, 34 UCC 2d 261 (1997). See also *In the Matter of the Estate of Sagmiller*, 615 N.W.2d 567, 44 UCC2d 309 (N.D.2000).

10. See *Assocs. Capital Services Corp. v. Riccardi*, 454 F.Supp. 832, 24 UCC 1359 (D.R.I.1978); *Central Budget Corp. v. Garrett*, 48 A.D.2d 825, 368 N.Y.S.2d 268, 17 UCC 327 (1975); *Schrock v. Citizens Valley Bank*, 49 Or.App. 1083, 621 P.2d 96, 30 UCC 1169 (1980); *John Deere Leasing Co. v. Fraker*, 395 N.W.2d 885, 2 UCC2d 1152 (Iowa 1986); *Farmers & Merchs. Bank v. Hancock*, 506 So.2d 305, 3 UCC2d 1983 (Ala.1987); *Villella Enters., Inc. v. Young*, 108 N.M. 33, 766 P.2d 293, 8 UCC2d 274

(1988); *Canadian Commercial Bank v. Archer Findley Co.*, 229 Cal.App.3d 1139, 280 Cal.Rptr. 521, 14 UCC2d 958 (1991).

11. See, e.g., *Bloomington Nat'l Bank v. Goodman Distrib., Inc.*, 482 N.E.2d 134, 41 UCC 1874 (Ind.App.1985); *Leasing Serv. Corp. v. Frey*, 735 F.2d 1370, 38 UCC 1414 (9th Cir.1984) (more than 17 months delay); *Johnson*, 116 B.R. 863, 14 UCC2d 1646 (Bankr.M.D.Ga.1990) (value of goods decreased because of delay). But see *First Bank Clifton v. Fernandez*, 842 F.2d 279, 6 UCC2d 302 (5th Cir.1988) (commercially unreasonable simply because of year delay); *In re Concord Coal Co.*, 116 B.R. 863, 6 UCC2d 1646 (S.D.W.V.1990) (90 day delay not unreasonable where creditor tried to find private buyer during that time); *Campbell Leasing, Inc. v. Ford*, 735 F.2d 1244, 12 UCC2d 136 (5th Cir.1984) (delay in sale of aircraft not unreasonable where debtors contributed to delay by not holding maintenance records and logs). Compare *First Bank of S.D. v. ...*, 495 N.W.2d 620, 6 UCC2d 1382 (S.D.

be made to do much cleaning or repair.¹⁵ It seems unfair to ask the creditor to put good money after bad and, in effect, to take a risk that money put into a commodity will not be recovered either in the sale price or from the debtor. On the other hand, if sellers in the market generally believe that the cost of minimal repairs or cleaning always raises the sale price by more than the cost, the creditor is probably obliged to undertake that minimal work. Comment 4 to 9-610 strengthens the claim that there is sometimes a duty to clean or repair if the preparation is not unduly expensive and if it would be considered unreasonable to fail to prepare the goods. Where the line falls between the sale as is and a duty to clean, we are uncertain, but the careful creditor will get advice on this and should be prepared to perform at least minimal repair and cleaning functions, especially if that is the general practice.

Sixth, the creditor should conduct the sale at the same time and place as that specified in the notice and advertisements. Failure to do so is likely to be commercially unreasonable.¹⁶

c. Price

In many of these cases, the courts should be slow to accept the debtor's assertions about how a better price could have been achieved. These assertions are often made by debtors who were scarce when the creditor was trying to sell the goods. If it was so obvious that a better price could have been obtained elsewhere, why did the debtor not suggest that to the creditor? (It is, of course, another matter where the creditor gives the cold shoulder to these suggestions.)

The courts should remember that the secured creditor is selling not only in the wholesale market, but usually at the low end of that market. The creditor is not a professional seller and buyers know that repossessed goods may not have been well maintained in the last days of a debtor's financial crisis. In some cases the low value of the goods after repossession may be related to the reasons why the debtor's business could not make a go of it with such goods as inventory or equipment. And, conceivably the debtor has failed for the same reasons that led the market to place a low value on the goods when offered for sale by the secured creditor.

Even if the price received at a foreclosure sale is *high*, the secured creditor may still have failed to satisfy procedural requirements of commercial reasonableness under 9-610(b). Of course, here the debtor will normally not complain, for debtor will receive all due credit for its equity in the goods sold. But in the rare case in which the debtor would

15. See *Ingersoll-Rand Financial Corp. v. Miller Mining Co.*, 817 F.2d 1424, 3 UCC2d 1632 (9th Cir.1987); *Credit Alliance Corp. v. Timmco Equip., Inc.*, 507 So.2d 657, 3 UCC2d 1995 (Fla.App.1987). But see, *Grumman Credit Corp. v. Rivair Flying Serv., Inc.*, 845 P.2d 182, 18 UCC2d 978 (Okla.1992).

16. *C.I.T. Corp. v. Anwright Corp.*, 191 Cal.App.3d 1420, 237 Cal.Rptr. 108, 3 UCC2d 1638 (1987) (sale held at different place). Cf. *Hertz Commercial Leasing Corp. v. Dynatron, Inc.*, 37 Conn.Supp. 7, 427 A.2d 872, 30 UCC 770 (1980).

rights of the secured party as contemplated by subsection (a)(3). Only to the extent the secondary obligor makes a payment in satisfaction of its secondary obligation would it become subrogated. To the extent its payment constitutes the price of the collateral in a section 9-610 disposition by the secured party, the secondary obligor would not be subrogated. Thus, if the amount paid by the secondary obligor for the collateral in a section 9-610 disposition is itself insufficient to discharge the secured obligation, but the secondary obligor makes an additional payment that satisfies the remaining balance, the secondary obligor would be subrogated to the secured party's deficiency claim. However, the duties of the secured party as such would have come to an end with respect to that collateral. In some situations the capacity in which the payment is made may be unclear. Accordingly, the parties should in their relationship provide clear evidence of the nature and circumstances of the payment by the secondary obligor.

We suspect the exhortation in the last sentence of the comment will be widely followed. Accordingly, it will be the job of lawyers and courts to determine whether parties are in fact "secondary obligors" and whether they satisfy any of the conditions in 9-618(a). As a starting point, we suggest one should examine the incentives of the person who has purchased the collateral. If, in these circumstances, that person appears to have incentives similar to those of the secured creditor itself (to lowball the price when a deficiency might be collectible), that is a good start toward the conclusion that the sale should not be regarded as satisfying 9-610.

e. Public vs. Private Sales

The text of the Code is still ambiguous on how public and private sales are to be differentiated. Comment 7 to 9-610 tells us that:

A "public disposition" is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).

This is more helpful than former 9-504²⁸ and appears to adopt the same law which courts applied to fill the void in the former Code. In *Lloyd's Plan, Inc. v. Brown*,²⁹ the Iowa Supreme Court said that: "The

28. Comment 1 to former 9-504 directs courts to 2-706 where Comment 4 defines a public sale as an auction. Yet not every sale by auction is "public" in all respects. Revised section 9-610, Comment 7 rejects this definition of public by stating that the term is not defined.

Although the term is not defined, as used in the Article a "public disposition" is

the public has had a meaningful opportunity for competitive bidding.

29. 263 N.W.2d 192, 14 UCC 1063 (Iowa 1978) (merely displaying collateral in public place is not public sale). See also *John Deery Motors, Inc. v. Stembrom*, 383 N.W.2d 553, 42 UCC 1856 (Iowa 1986) (competitive bidding not touchstone of public sale).

essence of a public sale is that the public is not only invited to attend and bid but is also informed when and where the sale is to be held." Other courts have, in the same spirit, stressed that a public sale is open to the general public or a major segment thereof, and thus contemplates advertising of the notice, time and place of the sale.³⁰ Under that standard a dealers' auction, open only to car dealers and their invitees, could and, in our opinion, often should, qualify as a public sale even though some parts of the public are excluded. A private sale, by contrast, is not open to the general public, usually does not occur at a pre-appointed time and place, and may or may not be generally advertised.³¹

Several courts (contrary to our instinct) have found that the term "public" requires that *all* of the public have access and that the exclusion of any of the public will make a sale private. For example dealer-only auctions where participation is restricted solely to dealers have generally been held to be private sales.³² In addition, in *Stewart v. Bank of Delaware*,³³ the sale of an automobile that was limited only to dealers and individuals who were on the bank's mailing list was also held to be private in spite of the fact that *any* individual could be placed on the list by providing his name, phone number, and address to the bank.

The 1999 Code also requires "competitive bidding." What else but an auction qualifies? Could a creditor sell goods on consignment? A bank's consigning repossessed cars to a used car dealer might be a sensible mode of sale. So we think that courts should be generous here.

A number of important legal rules presuppose a differentiation between public and private sales.³⁴ Of most fundamental relevance is the rule that a foreclosing secured creditor's choice of one mode of sale rather than the other may itself prove to be commercially unreasonable under 9-610. Sometimes the debtor claims that the creditor should have chosen a public sale when in fact the creditor chose to hold a private sale. This was true in the leading case of *Old Colony Trust Co. v. Penrose Industries Corp.*³⁵ The court, construing language in former 9-504(3) which is also found in revised 9-610(b), stated that:

[T]he second sentence of [former] section 9-504(3) would at least seem to include within the words "method, manner, time, place and terms" the fundamental choice of public versus private sale, and thus the secured parties must choose between a private or public

30. *Pioneer Dodge Center, Inc. v. Glaubensklée*, 649 P.2d 28, 33 UCC 1588 (Utah 1982).

31. *Security Federal Sav. & Loan v. Prendergast*, 108 N.M. 572, 775 P.2d 1289, 9 UCC2d 1400 (1989) (in a private sale, advertising is not essential).

32. See *Beard v. Ford Motor Credit Co.*, 41 Ark.App. 174, 850 S.W.2d 23, 20 UCC2d 1158 (1993); *Garden Nat'l Bank of Garden City v. Cada*, 241 Kan. 494, 738 P.2d 429 (1987). But see *Continental Ill. Nat'l Bank*

& Trust Co. v. *Hyder*, 150 Ill.App.3d 911, 104 Ill.Dec. 168, 502 N.E.2d 431, 3 UCC2d 883 (1986).

33. 1992 WL 423940.

34. However, the use of a private sale does not, on its own, trigger greater scrutiny. See *Thomas v. Price*, 975 F.2d 231, 19 UCC2d 335 (5th Cir.1992).

35. 280 F.Supp. 698, 4 UCC 977 (E.D.Pa.1968), *aff'd*, 398 F.2d 310, 5 UCC 565 (3d Cir.1968).

The purpose of notice is to give the debtor an opportunity either to discharge the debt and redeem the collateral, to produce another purchaser or to see that the sale is conducted in a commercially reasonable manner.³

Cases involving notice issues should be resolved with these three purposes in mind.

This notice must be sent to the debtor,⁴ any secondary obligor⁵ (e.g., guarantor), and, if the collateral is not consumer goods, to certain other persons who claim an interest or who have filed financing statements in the debtor's name that cover the same collateral. Observe that the creditor's obligation is merely to "send," not to insure receipt of the notice. Subsection (e) gives the secured creditor protection against the possibility that a third person will file a financing statement after the creditor has checked the files but before it has sent notice. The 1999 Code makes clear that guarantors and the like are entitled to notice; before 1999 that was not clear.

b. *Authenticated Notice*

Section 9-611(b) requires that the secured party "shall send" an authenticated notification to the debtor and others. The definition of "send" endorses mailing and intangible means of transmission, presumably fax, e-mail or the like.⁶ The Code rejects oral notice.⁷ Two reasons why oral notice cannot satisfy the notice requirement are set forth by *Executive Financial Services, Inc. v. Garrison*.⁸ First, the notice requirement protects the debtor, and should therefore be construed strictly. Second, written notice, or notice by an electronic record, serves special evidentiary functions. It not only evidences sending of the notice but also reveals its contents.⁹ We do not construe the "authenticating" require-

3. See *Buran Equip. Co. v. H. & C. Inv. Co.*, 142 Cal.App.3d 338, 190 Cal.Rptr. 878, 35 UCC 1694 (1983). For similar language describing the purposes of the former 9-504(3) notice requirement, see *Mallicoat v. Volunteer Fin. & Loan Corp.*, 57 Tenn.App. 306, 415 S.W.2d 347, 3 UCC 1035 (1966).

4. *FDIC v. Jahner*, 506 N.W.2d 57, 24 UCC2d 692 (N.D.1993) (though debtor was not given formal written notice, it had actual knowledge of the terms of the sale prior to sale; actual knowledge is sufficient under 1-201(25) and 1-201(38)); *Medallion Funding Corp. v. Helen Laundromat, Inc.*, 1997 WL 835420, 34 UCC2d 250 (N.Y.Sup.1997) (oral notice of sale may be sufficient if the fact-finder determines that the debtor was made sufficiently aware of the sale through such oral communication).

5. *Ford Motor Credit Co. v. Thompson Mach. Inc.*, 649 A.2d 19, 26 UCC2d 869 (Me.1994) (requiring notice to guarantors encourages them to protect their interests and maximize purchase prices at foreclosure sales).

6. Comment 9b to § 9-102.

7. § 9-611, Comment 5.

Subsections (b) and (c) explicitly provide that a notification of disposition must be "authenticated." Some cases read former Section 9-504(3) as validating oral notification.

8. 722 F.2d 417, 37 UCC 681 (8th Cir. 1983) (per curiam) (applying Missouri law).

9. For other cases with similar holdings, see *Jones v. First Nat'l Bank of Pulaski*, 505 So.2d 352, 3 UCC2d 1623 (Ala.1987) (applying Tennessee law); *Stoppi v. Wilmington Trust Co.*, 518 A.2d 82, 3 UCC2d 1645 (Del.Super.1986); *Boatmen's Bank v. Dahmer*, 716 S.W.2d 376, 2 UCC2d 754 (Mo.App.1986); *Van Ness v. First State Bank of Los Osos*, 420 N.W.2d 108, 7 UCC2d 597 (Iowa 1988); *Walker v. Grant County Sav. & Loan Ass'n*, 304 Ark. 571, 309 S.W.2d 913, 14 UCC2d 301 (1991) (debtor's prior knowledge is insufficient); *United Missouri Bank, N.A. v. Gagel*, 815

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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

MOUNTAINEER INVESTMENTS LLC, a
foreign corporation,

Respondent,

NO. 294692

vs.

**AMENDED CERTIFICATE OF
SERVICE OF BRIEF OF
RESPONDENT**

GARY HEATH and BARBARA HEATH,
husband and wife, and the marital community
comprised thereof,

Appellants.

I, Delian P. Deltchev, hereby declare that on this 23rd day of March, 2011, I served a true and correct copy of the foregoing Brief of Respondent, by hand delivery, to all parties named below:

University Legal Assistance
Attn: Alan L. McNeil
721 North Cincinnati Street
Spokane, WA 99220-3528

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of March, 2011, at Spokane, Washington.

Signature of Delian P. Deltchev

DELIAN P. DELTCHEV

AMENDED CERTIFICATE OF SERVICE OF
BRIEF OF RESPONDENT

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